

**MINUTES**  
**REGULAR MEETING OF BOARD OF LAND COMMISSIONERS**  
**November 20, 2006, at 9:00 a.m.**  
**Room 303 State Capitol Building**  
**Helena, Montana**

**PRESENT:** Governor Brian Schweitzer, State Auditor John Morrison, and Secretary of State Brad Johnson

**VIA PHONE:** Attorney General Mike McGrath and Superintendent of Public Instruction Linda McCulloch

Mr. Johnson moved for approval of the minutes from the October 16, 2006, meeting of the Board of Land Commissioners. Seconded by Mr. Morrison. Motion carried unanimously.

**BUSINESS CONSIDERED:**

1106-1      **FWP: SHIELDS RIVER FISHING ACCESS SITE**

Ms. Sexton said this is a Fish, Wildlife, and Parks proposal for 24 acres in Park County, six miles south of Clyde Park. It is a donation by a private landowner. It will be to protect public access to the Shields River and conservation of riparian habitat. It is for a walk-in, day-use fishing access.

Glen Erickson, FWP Field Services Administrator, said this is approximately a 24-acre parcel being donated to FWP. Its key resource values of the Shields River are primarily fisheries, riparian habitat and public access to the Shields River. The river is a major tributary to the Yellowstone River and has a quality trout fishery which currently has no designated public fishing access sites along it although you can access it from some of the bridge crossings. The property is located along Highway 89 and includes about ½ mile of river frontage. We plan to manage the property as a walk-in, day-use fishing access. We have prepared a draft EA which was released on August 24 for a 30-day comment period. A public meeting was held in Livingston and there was a follow-up meeting with area landowners in August. We issued a Decision Notice on October 6, 2006, and the FWP Commission gave its final approval on October 19<sup>th</sup>. Our Decision Notice has two conditions. We will contract with a commercial applicator to control weeds on the property, which was one of the requests during public comment, and we will also conduct a separate EA for any future development on the site. There was a lot of concern about how we would develop the site and what types of parking and public access would be there. We intend to do that in a full public participation in the future. Unless there are any questions, we'd appreciate your approval.

Governor Schweitzer asked if there were dissenters at the public meetings and if so, what was their concern?

Mr. Erickson said there were some dissenters. The comments we got back from the opposing side were from adjacent landowners. That is what caused FWP to hold a public meeting in that area, they requested it. They also felt we didn't follow the proper procedures for environmental analysis of the development and that is why we pulled off that to do it in a separate address. They also commented on the weeds. They felt because it is in the sight of their buildings that it would impact their property and the values. But since this is a donation and it is in an area where we don't have any fishing access sites we felt it was important to move forward with it.

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Motion was made by Mr. Johnson to approve the fishing access site donation. Seconded by Mr. Morrison. Motion carried unanimously.

1106-2      TONGUE RIVER RANCH ACQUISITION: APPROVAL

Ms. Sexton said this acquisition request received preliminary approval in July 2006, and since that time DNRC has been evaluating that property according to the land banking rules. We've had a considerable amount of public participation with the nominations. This was a department nomination out of 15 nominations we had for purchase. We secured a purchase agreement contingent upon the findings of the due diligence. The title report noted there is not access via a county road to the property, the commissioners are now working on this process. Apparently in Custer County many of the roads are not designated officially or legally as county roads. The public hearing will be held November 22, 2006. There is an evaluation summary provided for the Board. Also, we found for this parcel that the preliminary estimate for the appraisal came in lower than the sale price, and this is part of our purchase agreement, we do not have the final estimate of appraisal. But at this point in time it may be a couple hundred thousand dollars lower than the purchase agreement. So, it is my recommendation to the Board that it finally approve this with two contingencies: that the final purchase price not exceed the final appraised value and pending completion of the remediation, which is noted in the Land Board report, and also pending the designation of access to the ranch as a legal county road and so stated in the title report. Again, it is my recommendation that the Tongue River Ranch be finally approved for purchase at a price not to exceed the final appraised value, and we hope to get this final report in this week, and pending also the designation of access to the ranch as a county road and so stated in the title report.

Dru Burk, Powder River Ranch Realty representing Mr. Landers, said it is Mr. Landers' position that the contingency period expires today at your Land Board meeting and that he is not willing to negotiate to a lower price. I think possibly I can go back to him and see what I can do there but Ms. Sexton and I have come up with some ideas on how to fund the rest of the purchase price with Pheasants Forever or the Turkey Federation. Ms. Sexton mentioned the contingencies, you actually have three. The remediation as you have it written in your proposal is unacceptable also. We are not going to go out there and clean up all the old dumps, and according to the buy-sell agreement they are not addressed.

Governor Schweitzer said so I understand this, the owner is not willing to negotiate on price. The price is \$5 million and that is a take it or leave it today. But if the door is open for Pheasants Unlimited, the Turkey Foundation, or another conservation group to kick in \$100,000 or \$200,000, we wouldn't possibly be able to assure him that those dollars will be available today.

Mr. Burk said I think in the next couple of days Bryce Christensen from the Miles City FWP was making calls trying to see what he could come up with. But part of the problem is we don't know what the number is because the appraisal was not completed when it was supposed to be. One of the problems Mr. Landers is having is that the due diligence was not finished until late Friday afternoon. It is all rushed. I have a seller on the other end who sees everything in black and white. So we have to figure out what to do.

Governor Schweitzer said so the option on this farm actually only goes until today, and since we are not able to perfect today, then we are going to lose that option and the negotiation reopens.

Mr. Burk said with one exception, the county road, the access issue. Mr. Landers has agreed to wait until after the public hearing on Wednesday. He has agreed to give us a couple more days.

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Ms. Sexton said I would like to clarify that. The option does not run out today, it is until due diligence is completed. The landowner and the representative asked us to bring this to the Board today. It was to be in November or until the due diligence was completed, that is clear in the buy-sell agreement. At this point in time we were willing to bring this forward with contingencies. The contingencies are the county road, we did find the remediation with the dump sites, and finally the value which we do not have today. We expect it to be within that range, we haven't had a chance to look at the appraisal. The buy-sell agreement it is not ended today, but until the due diligence is completed.

Mr. Burk said it is our opinion that today is the last day, that the department had until the November Board meeting to complete its due diligence and that is it. That is Mr. Landers' position.

Mr. Morrison asked what cost do we anticipate the remediation adding up to?

Ms. Sexton said I don't know if my staff has any answer for that at this point in time.

Mr. Morrison asked were these dumps discovered during our due diligence work?

Ms. Sexton said that's correct.

Mr. Morrison said can somebody just give me a ballpark figure? When we were down there we did not talk about this at all and I have no idea how big a cost factor it is.

Jeanne Holmgren, Real Estate Management Bureau Chief, said the dump was found in our due diligence in a haz-mat study. Over time, ranches and farms have the typical dumps where they dump household and ranch debris. And that was what was found during the haz-mat review, several dumps that were just that, ranch and household debris. The recommendation was to remove those dumps to see what, if any, contamination was in the soils around them. The other consideration of note that was significant in the haz-mat review was a 55-gallon barrel buried some distance from one of the sheds that had some black material that they really didn't know what it was and the soil was stained around that. Those are the things we're asking that we felt was of significant note. There are other things such as gas cans, other barrels, those things that needed to be removed. Those were provided for in the purchase agreement. Coming back to what we felt was of issue were those dumps that are typically out there across the landscape of any farm and ranch operation, and specifically that 55-gallon barrel. We don't know what was in the barrel and there is some soil stain around it.

Mr. Morrison said so this could be a couple of days with a loader and dump truck or it could be a minor superfund project. We just don't know yet. That seems to me to create a very large variable that requires further investigation.

Governor Schweitzer said we have a bigger problem. We don't even get to that because if the opinion of the seller that after today that option is gone, it means we are back at the negotiating table full stop if, in fact, his opinion is correct.

Ms. Sexton said I would like to read to you from the purchase agreement, "the state shall have until the November 20, 2006, meeting of the Board of Land Commissioners to secure final approval from the Land Board commission for this acquisition or until the state has completed due diligence per Section 5.2 above." It is very clear that there is an "or" within the purchase agreement.

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Mr. Morrison said if we have discovered thus far in our research of the property that there are dumps, there is some leaching chemicals on the dumps, we don't know how extensive it is and it could be a minor thing or it could be an expensive thing, our due diligence is not done.

Ms. Sexton said correct, that's why we placed the contingencies upon this approval. Mr. Landers and Mr. Burk had asked that it come before the Land Board. We found these contingencies and felt comfortable with the approval pending the clarification of these three contingencies: the appraised value, the remediation, and the road issue. That is why we brought it forward at this time in that form.

Mr. Morrison said you say one of the contingencies you recommend is the remediation. Mr. Landers through Mr. Burk has said they are not going there. So when you talk about a contingency are you talking about some way to work that out or are you talking about contingent upon Landers agreeing to clean it up?

Ms. Sexton said contingent upon finding some way to work that out. We need to find out exactly what it is and I think there is room for further discussion. And at this time we have not completed our due diligence.

Mr. Morrison said for example, if we complete our due diligence and figure out what the total cost for remediation is, and if we get private groups that are interested in the acquisition and the access to this site to pitch in both for whatever the difference between the appraised value and \$5 million is plus the remediation, then everybody's happy.

Ms. Sexton said the contingencies have been met, yes.

Governor Schweitzer said if the conservation groups are involved in putting in some money, what do they want out of the deal? Then do we need to open it up for hunting for their groups? Is there something they get out of this deal other than habitat?

Ms. Sexton said at this point, they would simply be making a donation towards the purchase price knowing we can't pay more than the appraised value, and this would be ensuring public access which is in their interest.

Governor Schweitzer said we already have public access.

Ms. Sexton said that is correct so they are just assisting in guaranteeing that this property will be available for the public.

Mr. Burk said in the buy-sell agreement I took it upon myself to handle what the DNRC wanted cleaned up and it says, "the state shall get an estimate of the cost of removal of all mobile homes, junked vehicles, and equipment items. At closing I will deposit in escrow 1.5 times the estimate of that cost." It doesn't say anything about cleaning up the dumps.

Ms. Sexton said at that time the due diligence had not been completed.

Mr. Burk said I want to bring to the Board's attention why the due diligence hasn't been completed before Friday. The DNRC put the brakes completely on this project when it heard about the county road access issue. I told them at that time that we would do our best to get that rectified and they had better keep on with their due diligence, which they quit. The appraiser told me he waited 10 days for the "OK" after they hired him to proceed.

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Governor Schweitzer said what I have found in real estate deals, private real estate deals, when it gets time to fish and we are not cutting bait anymore and its time to sign the papers finally, if the seller or the buyer gets cold feet the deal is usually not going to go through. Does Mr. Landers want to sell the property to us? Because it seems to me we are as close as you can get on a real estate deal. We're no different than a private buyer. If you walked into closing and said unless we get this dot right over here and this line over here we are walking. If you do that, you usually end up walking.

Mr. Burk said you are different than a normal buyer, believe me. Mr. Landers' position is we were asking \$5.4 million for the ranch. He came down \$400,000 over time to make it work. There were many other smaller negotiations going on with possessions and things. Frankly, you have worn him out. Everybody draws a line in the sand and says that's it.

Governor Schweitzer said I like real estate deals like that because it means we are getting a good deal. I like it when they get to the edge of walking away.

Mr. Burk said I have read the minutes of the previous meetings and you have instilled in these people as your negotiators to be tough, but maybe you've taken it a little too far.

Ms. Sexton said from our review of the negotiations and of the situation and the warranties regarding the condition of the property, it is again our recommendation that these three contingencies be addressed before final approval.

Mr. Morrison said I had a chance with Attorney General McGrath to go down and tour the ranch with Dru and some other folks and the pheasants really did go on forever. There was quite a federation of turkeys there too. It really is a great wildlife sanctuary and I think there are great recreational opportunities there as well as some good income opportunities for the trust. I'd like to see the deal go through. But I think each of these contingencies are significant factors and if we approve this here today essentially it means the DNRC gets to continue working on this. If your folks want to walk away from it, as the Governor says, it's probably not going to happen. These are things we can work through, but they have to be worked through because this Board and the trust cannot pay more than the true market value for property. We obviously can't get ourselves into a situation where that value is substantially lost because of remediation costs. One of the purposes of this is public access. If there is no public access then the deal is not going to happen. Those are pretty important contingencies and its my understanding from your recommendation, Ms. Sexton, that if we approve this it gives the department the green light to continue moving forward with trying to close this deal subject to these three points.

Ms. Sexton said that's correct.

Mr. McGrath said the only thing I'd add to what Auditor Morrison said is there is also substantial value here in terms of river front and the issues related to the Tongue River. As you know, we are involved on the Tongue River in a lot of different ways, in terms of both water quantity and water quality issues. This acquisition will provide assistance to the state in those efforts but at the same time unless we address all of these three contingencies I think we would be unable to close this deal. I am willing to along with the recommendation as given by Ms. Sexton.

Governor Schweitzer said this is unusual but I'd like to take a five minute recess to discuss this with our attorneys. This is a legal contract and there seems to be some small bit of dispute as to the length of the option. I'd like to get some good legal advice.

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Governor Schweitzer said we're ready to go back on record. Continuing the public discussion on this, the concern is simply that the contract is a little bit vague and while we believe the contract is fairly clear that our earnest money is not in jeopardy. I've been in these deals before and both sides claim they get to keep the earnest money if things go south, and at a given time the earnest money moves from one side of the escrow to the other side of the escrow and it seems to me that day is today. Once it moves to the other side of the escrow my experience has been you've got to get a Philadelphia lawyer to get it back. Now, we happen to have a stable of good attorneys, a couple of which are on this Board and some more with DNRC. But we are not looking at taking on any litigation. We're trying to do a land deal here. As I said before, if there is not a willing buyer and a willing seller at the last moment, there are all kinds of things that can get you out of it. It seems to me within this Land Board and DNRC we have an active interest in purchasing this property, we are very close in terms of dollars. There is a concern among many of us to take on potential liability, I doubt there is a great deal. If this was a farm there is a larger chance there may be some real toxic stuff, if it's a cattle ranch, maybe some oil and gasoline and some barbwire. But we can't take that kind of risk for the people of Montana. Due diligence means due diligence. Through the process of due diligence we recognize there is an access problem that has to be resolved. We recognize there is some potential toxic substances that has to be resolved. The remediation has to be resolved. We think based on what has been told to us today, there is an opportunity there would be some conservation groups interested in closing the gap between the appraised value and the \$5 million. There is a very good chance that that \$5 million, which is the asking price, can be obtained. But if it is a take it or leave it that comes down here today, I'm going to have to hear from the Board, but my sense is that take it or leave it is not a good situation for the State of Montana to be in because if we leave this one we can take a lot of other deals. We are a cash buyer and we will be buying a lot of land across Eastern Montana and we will be looking for other properties. We have to do what is right for the people of Montana.

Mr. Burk said my wife and I were visiting and we think, Governor, if you have time to call Mr. Landers and explain to him the Board's position, that it will go a long ways to giving us more time.

Governor Schweitzer asked are you saying in the context of after the Land Board meeting today?

Mr. Burk said yes.

Governor Schweitzer said I would be willing to do that. I wouldn't be able to make a deal for the Land Board, I would just be able to describe to Mr. Landers what it is we did here today.

Mr. Johnson said I would assume that would happen only if we pass this particular agenda item with the contingencies that we've just discussed.

Governor Schweitzer said that would mean also the contingencies would include that we're not putting the \$250,000 of earnest money at risk. In other words, if the contingencies were we go another 30 days until we find out what's the deal with the remediation and we close the deal on the access and we do find a couple hundred thousand dollars from conservation groups, in addition to that contingency is that we agree in writing that our \$250,000 is not at risk for another 30 days.

Motion was made by Mr. Morrison to authorize the DNRC to move forward and approve the deal subject to four contingencies. One, that the price paid by the trust not exceed the appraised value; two, that we ensure access to the property over these gas tax roads; three, that we satisfy ourselves that the remediation is going to be taken care of within those cost parameters; and four, that Mr. Landers agrees that our earnest money is not at risk pending completion of this due diligence. Motion seconded by Mr. Johnson. Motion carried unanimously.

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Mr. McGrath said let me clarify this, if Landers doesn't agree on the earnest money then we just walk away.

Governor Schweitzer said that's correct, that's what we are saying. With the support of the Land Board at the conclusion of this meeting I will entertain a conversation with the owner and Mr. Burk. Obviously I am not authorized to make any deals, only to explain to him what it is we've done and why we've done it.

1106-3      POWELL COUNTY LAND BANKING PARCEL SALE #77 REAPPRAISAL  
RECONSIDERATION

Ms. Sexton said in June 2005 the Board approved the isolated state parcel #77 nominated by the lessee to continue through the land banking sale evaluation process. The cultural resource inventory has been completed. There was a request for a second appraisal by a private appraisal company which was conducted at the request of the lessee and paid for by the lessee. Our staff appraiser reviewed the second appraisal and determined no adjustment was warranted based on other comparable sales and there is no current market evidence to support a discount for the parcel value due to lack of access. So again, we appraised the parcel as if it had access. This allows us to make a recommendation to the Board of the minimum bid. We will continue to update the land banking web site to provide the public with the most current information on the sale status of this parcel. Again, this is parcel #77 in Powell County, 640 acres. The original appraisal was for \$600 per acre making it a total of \$384,000. The second appraisal reduced that by \$50 per acre, making it \$352,000. Based upon our review of the appraisals, it is my recommendation to the Board that the minimum bid remain \$384,000 for the 640 acres and that it go to bid at that minimum amount.

Dave Jackson, Attorney representing Meyer Company Ranch the nominee for parcel #77, said I am here with Greg Beebe from my law firm and Jim Hasty a representative of the Meyer Company Ranch. We believe there are some very important legal issues that need to be brought to the Board's attention today and we would like to have the Board review the issues we are presenting very carefully. I will introduce Mr. Beebe who was originally from Philadelphia so we can call him a Philadelphia lawyer.

Greg Beebe said I was originally from Philadelphia but I married a Montanan and am licensed to practice law in Montana. I have some presentation materials to hand out. We're here today because Meyer Company Ranch has been deprived of due processes procedure for the following four reasons. First, the first appraisal on which they have made this recommendation was flawed because the DNRC appraiser is not qualified to make that appraisal. That appraisal violated the land banking rules because it deviates from the rules of appraisal requirements. Then, the review of the second appraisal was flawed because the reviewer had a glaring conflict of interest. Finally a minimum bid based upon hypothetical legal access is contrary to Montana law. That value is not a legitimate value. As such, we respectfully request an independent review of the second appraisal which will show that that appraisal's valuation should be recommended and approved.

The first procedural error concerns the first appraiser's status on which the DNRC has made its recommendation of \$384,000. Tom Konency who performed the first appraisal for the DNRC was not qualified to do that appraisal. The land banking rules require that the appraisal be done by an appraiser "from a list of licensed department-approved appraisers." Foremost, Mr. Konency, the DNRC appraiser, is not licensed to appraise property in Montana. Despite the fact that he has a license in Wisconsin, Mr. Konency has applied to the Montana Board of Real Estate Appraisers to become a Certified General Appraiser in Montana and has been denied for failure to follow accepted appraisal practice. Those

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findings of fact, conclusions of law, and recommended order are at Tab 1 (in his hand out). Please take particular note to the conclusion of law #4 at Tab 2 which says, "Konency has failed to prove that he is qualified for licensure as a Certified General Appraiser. The appraisal reports he submitted in support of his application contained numerous substantial violations of the USPAP, the same guidelines that Montana is required to follow." The Montana Board of Real Estate Appraisers which is put in place to safeguard the integrity and the competency of the profession has determined that Konency is not competent to do appraisals in Montana. Under those circumstances, we are at a loss as to how DNRC can stand by the appraisal by Mr. Konency. Additionally, we are required to follow the land banking rules and Konency is not on the list of department-approved appraisers as required by the land banking rules. In addition to Konency's absence on this list, every appraiser on that list is a Certified General Appraiser licensed to appraise property in Montana. That list, which was provided by Candace Durran and the DNRC, is at Tab 3. That speaks volumes as to the interpretation of the term "licensed."

Today we've submitted the second appraisal for your review. It wasn't mentioned in Ms. Sexton's presentation, but Paraic Neibergs came to two valuations, his valuation with the lack of access of \$208,000, which hasn't been mentioned, and a hypothetical assuming legal access of \$352,000. Fifty dollars an acre less than what has been recommended so far. The appraisal was performed by Paraic Neibergs, he is a Certified General Appraiser in the State of Montana. Neibergs is an Accredited Rural Appraiser and his practice has an emphasis on appraising rural property. That appraisal is at Tab 4. The determination regarding value is at Tab 6, and his credentials, which are excellent, are at Tab 7. Neibergs as a Certified General Appraiser who did the second appraisal was bound by the ethical rules of his profession to render an independent professional judgment. And he has. Neibergs has determined there is a significant effect on parcel #77's value due to lack of access and it is well documented in his appraisal at Tab 5. In fact, outside of the few appraisals done by Mr. Konency, who's competency is at issue here, we've had several appraisals, numerous appraisals in this process, and there has been no other appraisal we are aware of other than a few by Konency who have come to the conclusion that there is no market data to support a discount for lack of access. This conclusion is without merit. Neibergs was able to locate comparable pairings to properly account for a lack of access. It is similar to the valuation of a conservation easement. Sometimes you have to go outside of the immediate market to find out what the appropriate discount is because, like a conservation easement, there is not a lot of land-locked property for sale out there. I think that after close review, Konency's questral appraisal pales in comparison to Neibergs' professional appraisal.

A second procedural error involves the first appraiser's conflict of interest. Konency, who we just spoke of, and who did the first appraisal for the DNRC was then commissioned to review the second appraisal. Here he had a blatant conflict of interest. He was put in the position, after doing his own appraisal, to review valuations that differed from his own and instead of being independent he was forced to advocate and defend his earlier conclusions. All of the parties involved deserve an unbiased independent appraisal and review in regard to this process. The Montana Supreme Court has stated, and MonTRUST too, that, "an independent appraisal represents the most reliable method of ensuring that the trust receives full market value." Neibergs' appraisal did just that and Konency's review was far from independent. Konency's bias is blatant in his review report. In that report he essentially takes issue with the fact that the state lacks legal access to the property and consequently determines the state's ownership rights have not been diminished "because the state has the right to fly in to their property to exercise the right to entry." This assertion is far fetched and non-conforming to the market and non-conforming to the topography of the property. I'd also like you to note in the same paragraph Konency also says the "department would further argue," this statement clearly demonstrates Konency's lack of independence. He didn't act as an independent appraiser, he acted as an advocate which is contrary to the USPAP rules, which have been adopted by the State of Montana, that require any appraisal be done by someone who is independent.



Now, to the third procedural error. Konency's appraisal severely violates the land banking rules regarding appraisals. That rule states the appraisal must, among other things, "include details of a discount in appraised value due to lack of access." This discount under the plain meaning of the rule, is mandatory. However, as you know the DNRC has instructed their appraisers to determine two values. One is "as is" value and then one assuming the hypothetical of legal access. Contrary to what has been said in the past, that deviation is not found in the land banking rules, it is not supported in the proposed rule meeting minutes. We can't find it. Consequently, any valuation including hypothetical legal access produces a skewed value that is not the largest legitimate value. To illustrate that point, please turn to Tab 12. On the left you see the land banking rule, which is the rule as adopted. On the right you see the land banking appraisal instructions provided by the DNRC. In particular you can see item 4 in the land banking appraisal instructions, and you can see the significant deviation from the appraisal rule cited above. We contend the rule was obliterated by the DNRC instructions. Meyer Company Ranch as a right to rely on the rules as adopted. Had the land banking appraisal rules been followed, the result would have been an actual "as is" value like Neibergs'. We want to be perfectly clear, we are not talking about a difference of opinion based on valuation. All we are asking for is that Meyer Company Ranch be afforded the mandatory procedures under this process. That's all.

Finally, the fourth procedural error concerns hypothetical valuation. Montana law mandates that actual value, not hypothetical value, be paid for the land sold by the Land Board. Analysis begins with the Montana Constitution. It says, "no land shall be sold by the Land Board until the full market value of the interest has been paid as may be provided by law." And the governing statute provides, "the state land may not be sold for less than the value determined by the Board after appraisal by a qualified land appraiser." Here we have value in the legislature statute and full market value in the Constitution. The Montana Supreme Court has spoken on the valuation with regard to this Constitutional provision, the Land Board and the Legislature and held that the actual value of the property must be paid for the land disposed of by the state. In Rider v. Cooney which governs this case, the court stated that value and market value as used above both mean actual value. A copy of Rider v. Cooney is provided at Tab 13. Parcel #77's actual "as is" value is \$278,000 without legal access. Actual "as is" value is a striking contrast to the hypothetical value which the DNRC recommends. Further, in that same Constitutional provision, it says Montana must get the full market value of the interest being sold, the interest being sold does not include legal access. The state is selling what it owns and what it owns is an isolated parcel without legal access. No one can sell, including the state, what they don't have. An actual value does not reflect what the state doesn't have.

We believe any appraisal should be done without consideration to who may purchase the property. Property is not appraised for one specific buyer, nor does actual value reflect that. Meyer Company Ranch should be given the opportunity to purchase parcel #77 at the price any other Montana citizen should be expected to pay. We agree that the state must obtain the largest measure of legitimate advantage and value for the sale of state land, but it is well settled they can't conduct business for an illegitimate value. To charge more than the "as is" value or the actual value would do just that. There is no hypothetical in the Constitution, there is no hypothetical in the governing statute, there is no hypothetical in the rules. There is no getting around it, actual value is the law.

In summary, the established process has failed in this case because the DNRC appraiser was not qualified to do the appraisal on which the DNRC has recommended that bid. That appraisal violated the land banking rules, the plain meaning of the land banking rules, and the second appraisal's review was skewed by a conflict of interest because it was reviewed by the first appraiser who is the same DNRC appraiser who is unqualified to give the first appraisal. Finally, a minimum bid must be based on the actual value of the property according to Montana law. All we ask is that Neibergs' appraisal be independently

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reviewed which will support his conclusions and that the Board adopt the largest legitimate value it is entitled to, the actual value, the "as is" value of the land and the Meyer Company Ranch be afforded due process and the protection of the law it is entitled to.

Jim Hasty, Representative of Meyer Company Ranch, said I appreciate the opportunity to speak our piece. I am disappointed and disturbed by some of the things I've seen during this process. I don't understand why the DNRC, knowing that Mr. Konency had failed the competency requirements of the state's own licensing board, would go ahead and use that individual. I have been involved in real estate for more than two and a half decades and I've never seen a comment as blatantly ludicrous as he made in some of his work, especially the one with respect to inferring legal access because you fly into a property. We all know that is preposterous. I am also a little disturbed by the lack of what I consider accurate information may be transparency. I read an article in the paper this morning where newly-elected Tester talked about wanting to bring transparency into government. I happened to look at what was submitted to the Land Board and I don't think you have all the information to make your decision based upon what the DNRC submitted to it. Mr. Beebe gave you more information. The DNRC gave you one value by Mr. Neibergs. Mr. Neibergs, again, a licensed appraiser in the State of Montana who has done work in the State of Montana specializing in rural and agricultural land for years and years. You were never provided with his additional valuation. Only one valuation. That seems particularly skewed in my opinion. It is disappointing that all of us really have to be here spending our time and money, the people of the state paying for this effort which I think if the department had used a licensed qualified appraiser we never would have had this issue. Right now we are in what I could consider a classic lose-lose situation. We'd like to buy some property, you'd like to sell some property, the state spent a lot of money on studies and reports. At the price it is valued at, it certainly doesn't make any sense for us to buy it. The state is going to have reports that are not going to be beneficial to anybody and who is the loser? The loser is the school system. We would spend about \$250,000 to buy this property, if we decide to go ahead and lease it, continue with the lease, it is going to take the school board about a half a century to gain that amount of money. I don't understand it. I don't understand the hypothetical access. Mr. Morrison, I believe, talked about you can only buy things based upon fair market value. We're no different than you are, we buy things based upon fair market value. Will we sometimes pay a little bit more for something within reason? Yes, within reason we would. But this is clearly beyond reason. I am sorry we are in this situation because I know your objective is to try and get money for the school board.

Governor Schweitzer said just for clarification, the land banking is not necessarily bringing in additional money, it is revenue-neutral. What we are doing is we are buying some pieces of property with money we have obtained by selling other pieces of property. This Board does not have as an objective to sell land to use those proceeds for the school trust. The land banking proposal is one where we sell certain pieces of property that make sense that are maybe surrounded by other private land and by other parcels of land that will generate revenue for the school trust. So the principal that we obtain in selling this property doesn't go to the school trust, it will be the value we get from the land as time goes on.

Motion was made by Mr. McGrath to table this item. He said there are serious questions raised about the appraisal. We could table it for a month and get all these answered. I don't think we should sit as a fact-finding body today and listen to all the sides of the argument. I think we ought to table it and try to get this sorted out. Seconded by Mr. Morrison.

Mr. Morrison said I'd like to hear what the department has to say about Mr. Konency, but first I'd just comment this is an issue, a legal issue really, we deal with over and over as we try to get this land banking program up and running. In almost every transaction, just by nature of what we're trying to do here, we have a parcel that is not accessible to the public but is accessible to the person who wants to buy it. So, there is a disparity from the outset between the access that the seller currently has and that the buyer will

immediately have upon completion of the deal. How you work that out in terms of the appraisal of the property is something we haven't really figured out yet. But it doesn't make sense for us to say that the value of the property should be based on no access when the buyer is immediately going to have access. We can all agree that the value goes up with access. It doesn't make much sense for the state to be engaging in deals where the buyer automatically gets a profit immediately upon completion of the deal. I don't know if there is legal authority about that, Mr. Beebe, that you'd like to share with us, but I haven't seen anything that gives us real clear guidance on how to resolve that dilemma.

Mr. Beebe said first, Rider v. Cooney does give you that legal authority how to determine that. What we're talking about here is full market value. Could this be replicated in the market? No. It couldn't be. It appears to me the overarching concern is if you were to sell this for what it is actually worth, sell to Meyer Company Ranch, they could turn around and sell it and make a profit. But that argument is flawed. For them to turn around and sell it and make a profit, the first thing they'd have to do is part with valuable legal rights on their adjacent property, they'd have to give an access easement, which is worth money. They would have to part with their quiet enjoyment of that. And to protect their cattle operations they would likely incur costs for cattle guards and fences. So while you try to get a value based upon the assumption of this legal access for them to tap into what is the concern here, they have to make significant costs.

Mr. Morrison said let me ask you this, if we completed this deal and your client acquired this property and then it was part of his ranch and he went to the bank to borrow money, how would he value this property? Would he value it as having access or not?

Mr. Beebe said I don't know the answer to that. I don't have an appraiser here that could give you that value. A qualified appraiser would have a better answer. But what we're talking about is what are we selling here? We are talking about the Constitution. The Constitution says you are selling the interest, your legal title, you don't have legal access but you are attempting to sell something that is not there. And that is a concern. Hopefully, there is a way everybody can work together to resolve this.

Mr. Morrison said I think that is a tricky characterization but I don't think it is an accurate one because we are not trying to convey more than we have, we are trying reach a value and there is a difference.

Mr. Hasty said I'd like to comment to what Mr. Beebe relegated to the appraisal side of the world. I have a degree in business, doing major real estate and finance and I have been involved and taken about every appraisal course the institute has and have been involved in valuation work for about 25 years. I don't know how many hundreds of appraisals I have reviewed or hired done. So I feel fairly familiar with the subject matter. To answer your question, if we were to sell that property and we sold just that 640 acres after we bought it, no we wouldn't get any more money for it than we have. The only way we would get more money for it would be to do exactly what Mr. Beebe said, to give an easement right which would basically be to take rights from some of the land we have now to give somebody access to it. I used to work for a life insurance company in the real estate department and had the good fortune to travel around the country involved in buying and selling real estate. It is really unusual to have no state law that forbids the sale of property that is land-locked. Almost always, and I've never seen any other state that allowed the sale of land-locked property. What that means is we get a lot of flag lots. A flag lot is like the flag, you've got 640 acres and you have this thing like a pole which is the access out to the county road. They do that two ways, the either deed that in fee to the person who buys that big flag portion or they will give an easement, a perpetual easement usually, on the pole. Sometimes fee, sometimes an easement. But you always have access. They don't even allow the sale of land-locked parcels and that would eliminate some of those kinds of problems. I hope that addresses your question about valuation. Because no, we wouldn't be able to turn it over and sell it the exact same way you do. The thing that is a little bit of a

bother to me is you have to sell what you own, and you don't own access rights. Do we own access rights to the county road on the other property? Yes, we paid for those. So, that's why we have that access, we paid the price. If this property was to be given access by our other properties, it would be like Mr. Beebe said, a reduction in some of the value of those properties by providing that access.

Governor Schweitzer said let us look at the chronology of how we all arrived here today. It wasn't that the State of Montana tried to put a transmission line or a pipeline across the property and now we're trying to determine fair market value. It was simply stated that the Meyer Company Ranch said we have an interest in acquiring property. And we [the state] own that property. At some point you need to have a willing buyer and a willing seller. We have a process of finding what we believe to be that value. Sometimes when we place a value on that land that willing buyer or other willing buyers say I'm going to walk away from the deal. When they do we tell them thank you very much, fortunately we still own the land and you don't. So, we need a willing buyer and a willing seller. What we've done here today, and obviously if we are to consider tabling this, we have analyzed the entire process by which we establish the value of this land. We do this a fair bit. We establish a value of the land that we think is a fair market value and DNRC gives us a recommendation. We've never had a private landowner yet, not once, hire an appraiser to get a second appraisal that was higher than the appraisal that we had. Not a single time have we had somebody come in here and say we've commissioned an appraisal and it was completely unbiased and we found out its actually worth more. It hasn't happened. To question the ethics of the appraisals, just about every appraiser gets paid by somebody, somebody is paying that appraisal. This ball got rolling because the Meyer Company Ranch had an interest in buying a piece of property and they came to us. Which started the ball rolling by saying we have to have a starting place to figure out what the value of this land is. This is not unusual for the buyer to get their own appraisal and the appraisal in every single case has come in at a lower price. Now I think Attorney General McGrath is one of the finest attorneys in Montana and he's made a motion that we will be considering to analyze what is this business about whether we have a ...I know it says the department shall have a licensed and department-approved appraiser. The question is, licensed by who and by what. You have taken the position that since he is not licensed by this particular Board, that license has no value. I don't know I have to ask some of our people. Does the license he has have some value or not? Is this person approved by the department? We'll ask those questions as well. But unfortunately it almost seems as though the Meyer Company Ranch and the State of Montana has come at odds for the wrong reasons. If the Meyer Company Ranch doesn't ultimately decide that the appraised price we've found is reasonable, they walk away. They don't have to buy it. They can continue to lease it I presume. But in some cases we have set a minimum bid and I'll be danged if somebody doesn't show up and bid more. The price goes up from there. This doesn't close the deal. State law does not tell us that someone cannot buy a piece of property that is land-locked. Just a couple of months ago, that happened. Someone came in and bid higher on completely land-locked. It is not our choice to care or know. We don't want this to become an adversarial relationship. We are renting land to the Meyer Company Ranch and we have not reason to believe they are not great renters. If we can find a deal we can strike then we will go forward. But we don't want it to be adversarial.

Mr. Beebe said as you pointed out there have been a few sales for more than the recommended bid and there have been plenty that have gone through with the hypothetical. The first thing I think that has to be pointed out, in particularly for those four parcels, is the amount of money we're talking about. First, we're talking about the differentiation in value of about \$30 - \$50 per acre. When you go to those four sales that are above that, I think we're talking about \$12,000 above that overall. We're talking about smaller valued parcels where the discrepancy is not nearly as big. So, if a parcel was valued at \$12,000 without access and then \$15,000 with hypothetical, are they more likely than Meyer Company Ranch to say okay we'll pay \$15,000? That is a little different than the \$384,000 versus \$352,000 or \$200,000. I think my question to you is what could the DNRC or how much could the DNRC or the state go and get a loan for

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on that property if they could now. The question is what is it worth now? What is the value? We're not trying to get this for below what it is worth, we just want it to be sold according to Montana law.

Mr. Morrison said we can keep talking about this if this motion to table it passes. I have been an advocate of this program for a long time and I want to see these deals go through. But I am not ready to accept the proposition that every time we sell a doughnut hole that we're going to be taking the appraisal based upon no access. I think it should be more nuance than that so I want to continue to look into a good way to resolve that. I'd like now to hear what the department has to say about this appraiser and why we've got this guy.

Governor Schweitzer said I think we can hear that after we table this and move forward. There were several concerns laid out today, we can answer that question or we can answer all the questions sometime between now and the next Land Board meeting.

Mr. Morrison said I would just like to hear why you picked this guy.

Ms. Sexton said I would like to address some of these issues. One, Mr. Konency is licensed in the State of Wisconsin and he is working on his license here in the State of Montana. It does state in our rules that we have to have a licensed appraiser, and department approved, and he is. It also states in our rules that when we do an appraisal we can conduct it ourselves, which we have with some of the land banking, or we can hire out of an approved-list and commission other appraisers to have it done. We chose in this instance to have our in-house appraiser conduct the appraisal. We have that ability. I want to mention statutorily outside of the rules the state is not required in its appraisal activities to have licensed appraisers. As an example, the Department of Transportation employs 27 appraisers and it is not required that they be licensed by the Board of Real Estate Appraisers, and many of them are not licensed. The Department of Revenue appraisers for fee and simple properties for taxation are not required to be licensed. The licensure is required for federal appraisers by the licensing board to appraise properties with federal funds. So that is the requirement. If we were appraising a property that dealt with federal funds we'd have to have the licensed appraiser. At this point in time, it is not statutorily required. In fact, the real estate appraiser license does not apply to public officials in context of their official duties that are not governed by rules established by federal financial institutions examination council agencies. So we are following our rules and we are also within our statutory limitations with Mr. Konency. He has performed a number of appraisals. The Board has the discretion, as it has all along, to determine which minimum bid it wants to choose. It is written in the land banking rules that we have it done both ways and the Board has consistently chosen we take the minimum bid with access. That has been a very consistent choice by the Land Board that has been communicated to us. With the appraisal process, again, the difference here in that minimum bid for this property with legal access is \$50 per acre. We feel that is certainly within the range, we then therefore go with the appraisal done by our appraiser in recommending to the Board that we stay with the minimum bid as noted at the \$384,000. The access issue is something the Board has deliberated time and time again, and this came out with the negotiated rulemaking, and has consistently come out for the best and highest fair market value we move forward with the appraisal with access. Mr. Konency is licensed in the State of Wisconsin and is working on his licensure here. Many appraisers within state government do not have state licensure at all.

Mr. Morrison said the one thing that concerns me here is these documents Mr. Beebe showed us indicate that Mr. Konency has applied here and has been turned down by our board because he has irregular reports. It seems to me the department should be dealing with appraisers that are beyond reproach.

Ms. Sexton said we have gone through this process and he has gone through the Board of Real Estate Appraisers and there was a difference of opinion on how his work was reviewed. He was denied. He

challenged their assertions and he is now going back and he has a certain period of time within which he has to gain his Montana licensure. In the meantime he continues to be a licensed appraiser as is stipulated in our land banking rules. I would be glad to give you full disclosure on that issue between now and the next meeting if that is your desire.

Governor Schweitzer said this Board has looked at appraisals in the past and sometimes we choose the appraisal of the low end (not very often), or the high end (more often), or cut the difference sometimes but ultimately we have the responsibility of choosing the minimum bid based on all pieces of information provided to us. I think in the future we could have an appraisal that says some thing is worth \$500 and if the majority of this Board says we are going to put a minimum bid of \$600 we have the ability of doing that. We are the owners of this property and we can choose to put whatever value we want on it as a minimum bid and if that minimum bid is not obtained, then we walk away still the owner and the one who wanted to buy it doesn't bid on it.

Ms. Sexton said the appraisal is the basis for our recommendation to the Board.

A vote was taken on the motion to table the issue until the December meeting. Motion carried unanimously.

1106-4      TRANSFER OF NON-TRUST PROPERTY (From DEQ to DOT)

Ms. Sexton said the Montana Department of Transportation has requested from the Department of Environmental Quality the transfer of a 22+-acre parcel of non-trust property near the Anaconda interchange off I-90 for use as a rest area facility.

Bill Kirley, Department of Environmental Quality (DEQ) Attorney, said also here today is Joel Chavez who runs the clean up program of Silver Bow Creek for DEQ and also Betsy Tarrant and Shane Mintz from MDOT. In a 1998 settlement with Atlantic Richfield Company (ARCO) which settled a portion of the state's natural resource damage claim DEQ ended up with title to certain parcels of property along Silver Bow Creek between Butte and Anaconda. In 2003, the MDOT approached DEQ about using a portion of that property near the Anaconda interchange for a rest area. In 2003, the MDOT, DEQ, the Natural Resource Damage Program, and the Department of Justice entered into an agreement to arrange use of that property as a rest area. That agreement was supported by Anaconda-Deer Lodge County and what is called the Greenway Service District which is a combined entity of Butte-Silver Bow County and Anaconda-Deer Lodge County that is promoting a recreational trail system corridor along Silver Bow Creek from Butte to Anaconda. Under that agreement the DEQ cleaned up the property ahead of schedule. The property that was transferred to us in this area had a substantial deposition of mine tailings that had flowed down Silver Bow Creek from Butte and mining operations along the creek and had been deposited there primarily in a flood in 1908. That clean up has been completed. A subdivision has been done to earmark a 22-acre parcel of property that MDOT has asked be transferred to them for use as a rest area. I have a diagram to show the Board. To help the Board see the location of the property, I-90 is the highway from Butte going up toward Garrison. The interchange you can see is the Anaconda interchange. Highway 1 then leaves the interstate and goes into Anaconda. The parcel just south of Highway 1 is the property proposed for transfer.

Motion was made by Mr. Morrison to approve the transfer of property. Seconded by Ms. McCulloch.

Mr. McGrath said this is obviously an issue that I am quite familiar with, I just want to complement DEQ particularly Mr. Chavez and Mr. Kirley, but many others, for the incredible work they have done along

the Silver Bow Creek corridor. This is just a terrific example of the great work and clean up that is being done by the state in conjunction with many partners. So I just want to complement them on the good work they have done.

Governor Schweitzer said I might add that not only the good work they have done, but they have come substantially under budget on Silver Bow Creek. The estimates were much greater to our dismay.

A vote was taken on the motion to approve the transfer. Motion carried unanimously.

1106-5            DISCLAIMER OF INTEREST

Ms. Sexton said this is from Glacier County who has requested the State of Montana issue a Disclaimer of Interest for a 3.57-acre parcel in the Town of Cut Bank which is adjacent to the Glacier County Hospital. The department had previously issued state patents for the surface of the affected land and retained the mineral rights. Glacier County has requested this Disclaimer of Interest because of the belief that the common boundaries for the parcel previously conveyed to the state in the 1950's were mis-located upon the ground. Aerial photographs of the affected land are provided to the Board along with a Disclaimer of Interest proposed for this to be issued. Ms. Sexton recommended the Board approve the issuance of a Disclaimer of Interest to assist Glacier County in clarifying title to these land upon which the emergency heliport for Glacier County Hospital is located.

Motion was made by Mr. Morrison to approve the issuance of a Disclaimer of Interest. Seconded by Mr. Johnson. Motion carried unanimously.

The Board addressed the following three proposed timber sales as one item.

1106-6            DEER CREEK SALVAGE LIMITED ACCESS TIMBER SALE

Ms. Sexton said this timber sale is part of the Derby Fire area and is out of our Bozeman Unit office, about nine miles SE of Big Timber. It is a limited access sale, the state was granted access from the Sierra Ranch which surrounds the parcel for the purpose of salvaging timber in this section. The estimated sale volume is 1,000 MBF with a negotiated value of \$105,365.00. There will be an additional charge of \$.40/ton for Forest Improvement Fee. The sale contains nine harvest units totaling 247 acres. Because of the Derby Fire's intensity, a regeneration harvest would be applied to the moderate to severely burned areas and a group selection harvest would be applied to the light to moderately burned areas favoring Douglas fir. Access is across existing roads.

1106-7            DOG VALLEY SALVAGE TIMBER SALE

Ms. Sexton said this proposed timber sale comes out of our Plains Unit office and approximately seven miles SW of Ravalli. It has an estimated volume of 4,134 MBF with an estimated minimum value of \$556,257.00. There is beetle kill and much of the green timber is infected with insects and/or disease. The sale contains eight harvest units totaling 514 acres. There is no old growth associated with this proposed sale. Approximately 3.05 miles of new road would be constructed and 12.0 miles of existing road would be reconstructed to meet current BMPs. An existing ford across the North Fork of Valley Creek would be reclaimed and .08 miles of road would be obliterated. All new roads on state lands would be physically blocked to prevent motorized use once the sale is completed.

1106-8      EDNA MOUNTAIN II TIMBER SALE

Ms. Sexton said this proposed sale is out of our Stillwater Unit office near Trego. It has an estimated volume of 2,789 MBF with an estimated minimum value of \$486,848.00. There will be an additional Forest Improvement Fee of \$3.12/ton. The sale contains eight harvest units totaling 227 acres. Silvicultural prescriptions include 35 acres of commercial thin and 192 acres of seed tree harvest. This is an urban interface area, and the reduction of wildfire fuels is an integral part of the proposed harvest prescription this reduction of fuels and stems per acre is also expected to improve overall forest health. No old growth would be harvested. Access is on 5.7 miles of existing road which would receive minor reconstruction to meet current BMPs, and there will be .35 miles of reconstruction to access the harvest units. Temporary roads constructed during the sale would be reclaimed following harvest activities.

Ms. Sexton recommended approval of the foregoing three timber sales.

Motion was made by Mr. Johnson to approve the Deer Creek Salvage Limited Access Timber Sale, Dog Valley Salvage Timber Sale and Edna Mountain II Timber Sale. Seconded by Mr. Morrison. Motion carried unanimously.

Governor Schweitzer said once again, we've demonstrated as the State of Montana that we can get into these fire-affected areas and just about as quick as the smoke is gone we are already cruising it and getting the sales taken care of. DNRC, thank you. To the rest of the Board who agree that this is part of responsible management, thank you. And to the federal government, you should be observing how it should be done.

1106-9      A. RIGHTS-OF-WAY APPLICATIONS  
              B. RECIPROCAL ACCESS: USFS COST SHARE ACCESS

1106-9A. Ms. Sexton said this month we have 35 rights-of-way applications for approval. There is a private access road under the new policy, Sauerbier Ranches, and this is at this point in time just for agricultural purposes. They understand if this turns into residential purposes that the new policy applies. This month they are #12416 from Russell Salisbury for a private access road; #12794 from Sheridan Electric Cooperative for an overhead electric distribution line; #13439 and 13473 from Triangle Telephone Cooperative for buried telecommunications distribution lines; #13555 through 13557 from Project Telephone Cooperative for buried distribution telecommunications cable; #13560 through 13571 from Big Horn County Electric Cooperative for overhead electric transmission lines; #13938 and 13979 from Fergus Electric Cooperative for overhead electric distribution lines; #13939 through 13946 from Hill County for public county roads; #13947 from Yellowstone County for a public county road; #13974 from Sun River Electric Cooperative for an overhead electric distribution line; #13975 from Sauerbier Ranches for a private access road; #13976 from James and Robert Bowling for a private access road; #13977 from Whistle Creek Partners for a private access bridge; and #13978 from Qwest Communications for a buried telecommunications cable. Ms. Sexton requested approval as a package.

Motion was made by Ms. McCulloch to approve the applications for rights-of-way. Seconded by Mr. Morrison. Motion carried unanimously.

1106-9B. Ms. Sexton said this is another access and is part of a reciprocal package with the Lolo National Forest, that is why we took it out specifically. As you look we will have some extra miles, and in a sense will owe the Forest Service \$5,000 for the extra access but this will go into the kitty and carry



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forward for our reciprocal package with the Forest Service. This is with the Lolo National Forest under the reciprocal exchange agreement. Ms. Sexton recommended approval.

Motion was made by Mr. Morrison to approve the reciprocal access application. Seconded by Mr. Johnson. Motion carried unanimously.

PUBLIC COMMENTS

Dru Burk, resident of Custer County, said I have a question, I am told the State of Montana is either by statute or administrative rule requiring all counties to purchase right-of-way across state lands, and are trying to make that retroactive. Why would you, in lieu of this policy, ask Custer County to acquire right-of-way by resolution to property you want to purchase without compensation to affected landowners?

Ms. Sexton said I can answer that quickly – the Supreme Court told us to.

Mr. Burk said I was asked by people that are affected to ask you that.

Ms. Sexton said its gone through the process and from the Supreme Court we have to gain fair market value. When the counties go through the road acquisition process they do it either by petition or resolution and payment is not required.

Motion to adjourn was made by Mr. Morrison.